Supreme Court, U.S.
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No.:

IN THE

SUPREME COURT OF THE UNITED STATES

Thomas S. Burns, Jr., on behalf of himself and all others similarly situated and the Barnett Employee Savings & Thrift Plan,
Petitioners

v.

Charles E. Rice, Thompson L. Rankin, Jack B. Critchfield, Rita Bornstein, Remedios Diaz Oliver, Frederick H. Schultz, James L. Broadhead, Alvin R. Carpenter, Stewart Turley, Clarence V. McKee, Marshall M. Criser, and John A. Williams,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a discretionary determination by an ERISA plan sponsor's board of directors "through an existing provision of the Plan rather than an amendment" is a "settlor-type function," as opposed to a fiduciary act of plan administration, because the "effect of the action is what is key" to the settlor-fiduciary distinction, as held by the United States Court of Appeals for the Eleventh Circuit?

PARTIES TO THE PROCEEDING

The petitioners are Thomas S. Burns, Jr., on behalf of himself and all others similarly situated and the Barnett Employee Savings & Thrift Plan (the "BEST Plan").

The respondents are Charles E. Rice, Thompson L. Rankin, Jack B. Critchfield, Rita Bornstein, Remedios Diaz Oliver, Frederick H. Schultz, James L. Broadhead, Alvin R. Carpenter, Stewart Turley, Clarence V. McKee, Marshall M. Criser, and John A. Williams, (collectively the "Barnett Board"), who were all members of the board of directors of Barnett Banks, Inc., which through succession is now owned by BankAmerica Corp. (formerly NationsBank Corp.), a publicly traded corporation that is a parent to a number of subsidiaries, some or all of which are wholly owned.

TABLE OF CONTENTS

TABLE OF AUTHORITIES 4

STATEMENT OF JURISDICTIONAL GROUNDS 5

STATUTORY PROVISION 5

STATEMENT OF THE CASE 6

REASONS TO GRANT THE WRIT OF CERTIORARI 9

The Eleventh Circuit's Holding Conflicts with this Court's Holdings in *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996), *Varity Corp. v. Howe*, 516 U.S. 489 (1996), and *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999) 9

CONCLUSION 20

APPENDIX 22

Appendix A, *Burns v. Rice*, No. 99-2094 (11th Cir. 2000) 23

Appendix B, *Burns v. Rice*, No. 98-233-CIV-21A (Dec. 10, 1998), reported in 39 F.Supp.2d 1350 (M.D. Fla. 1998) 28

Appendix C, Judgment in Burns v. Rice No. 98-233-CIV-21A (Dec. 11, 1998) 45

Appendix D, Section 4.5 of the BEST Plan 46

TABLE OF AUTHORITIES

CASES

Burns v. Rice, 39 F.Supp.2d 1350 (M.D. Fla. 1998) 5, 12, 19

Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73 (1995) 9

Herdrich v. Pegram, 154 F.3d 362 (7th Cir. 1998), *cert. granted*, 120 S.Ct.10 (Sept. 28, 1999) 15

Hughes Aircraft Co. v. Jacobson, 525 U.S. 432 (1999) 7, 9, 10, 14

Inter-Modal Rail Employees Association v. Atchison, Topeka and Sante Fe Railway Co., 520 U.S. 510 (1997) 12

Lockheed Corp. v. Spink, 517 U.S. 882 (1996) 7, 9, 10, 11

Varity Corp. v. Howe, 516 U.S. 489 (1996) 9, 16, 17, 19

STATUTES

Section 1002(21)(A) of Title 29 of the United States Code 6, 7, 15

Section 1254(1) of Title 28 of the United States Code 5

OPINIONS BELOW

On February 17, 2000, the United States Court of Appeals for the Eleventh Circuit affirmed the dismissal with prejudice of Burns' amended complaint by the United States District Court for the Middle District of Florida. A copy of the unreported opinion of the Eleventh Circuit (App.A) is contained in the Appendix.

On December 10, 1998, the United States District Court for the Middle District of Florida in a published order, *Burns v. Rice*, 39 F.Supp.2d 1350 (M.D. Fla. 1998), dismissed with prejudice Burns' amended complaint and the following day entered a separate judgment in favor of the Barnett Board. Copies of the order of dismissal (App. B) and of the judgment (App. B) are contained in the Appendix.

STATEMENT OF JURISDICTIONAL GROUNDS

This Court has jurisdiction under section 1254(1) of Title 28 of the United States Code to review by certiorari the opinion of the United States Court of Appeals for the Eleventh Circuit rendered on February 17, 2000.

STATUTORY PROVISION

Section 3(21)(A) of ERISA provides:

> [A] person is a fiduciary with respect to ~~a~~ plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders

> investment advice for a fee or other compensation, direct or indirect, with respect to any monies or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A).

STATEMENT OF THE CASE

On December 10, 1998, the United States District Court for the Middle District of Florida dismissed with prejudice Burns' amended complaint that alleged the Barnett Board breached its fiduciary duty to Burns and other BEST Plan participants when it made a discretionary determination relating to a change of control event pursuant to the terms of the BEST Plan, an ERISA qualified pension ESOP. The BEST Plan provided in section 4.5 that upon a change of control event of Barnett Banks, Inc. ("Barnett"), approximately 3,300,000 shares of unallocated Barnett stock owned by the BEST Plan would immediately vest and be allocated to Barnett's employee participants' individual accounts. The value of those shares at the time Barnett was acquired by NationsBank was approximately $250,000,000 or a quarter of a billion dollars. In addition, Barnett was required to immediately pay off an acquisition loan whose principal balance was approximately $53,000,000. However, section 4.5 of the BEST Plan also provided that no change of control event would be deemed to occur if before the event the Barnett Board determined not to treat the event as a change of control. The authority for the Barnett Board to make the discretionary no change of control determination was found exclusively within section 4.5 of the BEST Plan.

Burns' amended complaint alleged that the Barnett Board made a no change in control determination two days prior to the shareholder vote approving the merger of Barnett with NationsBank, which was a change of control event under section 4.5 of the BEST Plan. Burns alleged that this discretionary determination was a fiduciary act of plan administration under section 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A). Furthermore, Burns alleged that the BEST Plan had neither been amended nor modified. The Barnett Board moved to dismiss Burns' amended complaint with prejudice on the basis that the determination was not a fiduciary act, which the district court granted.

On February 17, 2000, the United States Court of Appeals for the Eleventh Circuit affirmed, finding Burns "has failed to fully appreciate the fact the courts recognize a distinction between plan administration, which is fiduciary, and settlor-type functions, which are not fiduciary." App. A. at 25. After citing to this Court's decisions in *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996) and *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999), the Eleventh Circuit held:

> In the present case, the Defendants were unquestionably acting as settlors in determining that the merger should not be deemed a change of control for purposes of the BEST Plan. They were not administering plan benefits or managing plan assets but were determining the level of benefits to be afforded plan participants, a settlor-type function, and therefore were privileged to act in the best interests of the company as employer and Plan sponsor rather than in the best interests of the Plan participants. The Board's vote simply eliminated purely contingent and wholly unaccrued and non-

> vested benefits. *That the Board accomplished this through an existing provision of the Plan rather than an amendment is irrelevant; the effect of the action is what is key. . .* Defendants breached no duty owed the Plan participants under ERISA, and for the reasons set forth herein and in the well-reasoned order of the district court, the decision below is AFFIRMED.

App. A at 26-27.

Finally, the basis for the jurisdiction of the district court over Burns' amended complaint was federal question.

REASONS TO GRANT THE WRIT OF CERTIORARI

The Eleventh Circuit's Holding Conflicts with this Court's Holdings in *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996), *Varity Corp. v. Howe*, 516 U.S. 489 (1996), and *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999)

After the district court dismissed Burns' amended complaint, this Court in *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999) clarified any misperception there may have been with respect to settlor functions and fiduciary decisions, in light of its previous opinions, including *Varity Corp. v. Howe*, 516 U.S. 489 (1996) and *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996). Under *Hughes*, in combination with *Spink*, the issue as to the applicability of a fiduciary duty to an employer who is both a plan sponsor and plan administrator is determined by the nature of the act engaged in by the employer with respect to the plan.

Spink held that plan sponsors act as settlors when they "adopt, modify, or terminate welfare plans." *Spink*, 517 U.S. at 890, quoting *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995) and quoted in *Hughes*, 525 U.S., at 443. *Spink* further held that that an employer's act of amending a plan by itself did not constitute an exercise of fiduciary duty. *Spink*, 517 U.S., at 891. *Hughes* made clear that the same holding applies, regardless of the type of ERISA plan involved. *Hughes*, 525 U.S., at 443-44. ("Our conclusion applies with equal force to persons exercising authority over a contributory plan, a noncontributory plan, or any other type of plan.") This was "for the simple reason that the plain language of the statute defining fiduciary makes no distinction [as to the type of the plan]. Rather, it turned on whether the employer's act of amending its plan constituted

an exercise of fiduciary duty. In *Spink*, we concluded it did not." *Id.* at 444 (citations omitted).

The Court in *Hughes*, 525 U.S., at 444-45, reasoned:

> A settlor's powers include the ability to add a new benefit structure to an existing plan. Respondents' three fiduciary duty claims are directly foreclosed by *Spink's* holding that, without exception, "[p]lan sponsors who alter the terms of a plan do not fall within the category of fiduciaries." 517 U.S., at 890.

Previously, the Court in *Spink*, 517 U.S., at 891, had held that whether a determination was a fiduciary act did not depend upon the type of ERISA plan:

> The definition of fiduciary makes no distinction between persons exercising authority over welfare benefit plans and those exercising authority over pension plans. It speaks simply of a "fiduciary with respect to a plan," 29 U.S.C. § 1002(21)(A), and of "management" and "administration" of "such plan," *ibid.* And ERISA defines a "plan" as being either a welfare or pension plan, or both. *See* § 1002(3). Likewise, the fiduciary duty provisions of ERISA are phrased in general terms and apply with equal force to welfare and pension plans. *See, e.g.*, § 1104(a) (specifying duties of a "fiduciary . . . with respect to a plan"). *See also Shaw v. Delta Air Lines, Inc.*, 463 U.S., at 91 (ERISA "sets various uniform standards, including rules concerning . . . fiduciary responsibility, for both pension and welfare plans"). Given

> ERISA's definition of fiduciary and the applicability of the duties that attend that status, we think that the rules regarding fiduciary capacity--including the settlor-fiduciary distinction--should apply to pension and welfare plans alike.

The Court in *Spink*, 517 U.S., at 889-91, described the rationale for the settlor-fiduciary distinction and held:

> We first address the allegation in Spink's complaint that Lockheed and the board of directors breached their fiduciary duties when they adopted the amendments establishing the early retirement programs. Plan sponsors who alter the terms of a plan do not fall into the category of fiduciaries. As we said with respect to the amendment of welfare benefit plans in *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995), "[e]mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." *Id.*, at 78 (citing *Adams v. Avondale Industries, Inc.*, 905 F.2d 943, 947 (C.A.6 1990)). When employers undertake those actions, they do not act as fiduciaries, 514 U.S., at 78, but are analogous to the settlors of a trust, *see Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184, 1188 (C.A.7 1994).
>
> This rule is rooted in the text of ERISA's definition of fiduciary. *See* 29 U.S.C. § 1002(21)(A) (quoted n. 2, *supra*). As the Second Circuit has observed, "only

> when fulfilling certain defined functions, including the exercise of discretionary authority or control over plan management or administration," does a person become a fiduciary under § 3(21)(A). *Siskind v. Sperry Retirement Program*, Unisys, 47 F.3d 498, 505 (1995). "[B]ecause [the] defined functions [in the definition of fiduciary] do not include plan design, an employer may decide to amend an employee benefit plan without being subject to fiduciary review." *Ibid.* We recently recognized this very point, noting that "it may be true that amending or terminating a plan . . . cannot be an act of plan 'management' or 'administration.'" *Varity Corp. v. Howe*, 516 U.S. 489, 505 (1995). As noted above, we in fact said as much in *Curtiss-Wright*, *see* 514 U.S., at 78, at least with respect to welfare benefit plans.

Both the Eleventh Circuit and the district court in *Burns* misunderstood that whether a decision is a fiduciary act has nothing to do with the effect of an action. Instead, as the Court held in *Spink* and confirmed in *Hughes*, it is the nature of the employer's act with respect to the plan that determines whether the act is fiduciary. When an employer acts as a settlor with respect to a plan, the act is not an exercise of a fiduciary duty, regardless of whether the benefits affected are pension benefits, some of which may be accrued or vested, or whether they are welfare benefits, which by definition are neither accrued nor vested. *See Inter-Modal Rail Employees Association v. Atchison, Topeka and Sante Fe Railway Co.*, 520 U.S. 510, 514 (1997).

On an everyday basis employers, acting as plan administrators, make fiduciary decisions regarding nonvested

and unaccrued benefits of participants. A simple example is an employer's determination to pay or not pay a medical claim submitted by an employee under a medical welfare benefits plan. That decision by the employer is a fiduciary act of plan administration, despite the medical benefit at issue being nonvested and unaccrued because a welfare plan is involved. On the other hand, an employer's plan design decision to amend or terminate a pension plan, where many of the participants' benefits are both vested and accrued, is a settlor function, even though as a result of the plan amendment or termination the participants might no longer receive additional accruals or additional vesting.

By further example, an employer's determination that a group of employees sickened by an epidemic are not ill and therefore are not entitled to payment of their claims under a medical welfare benefits plan is not a plan design decision concerning the level of benefits under that same welfare plan. The decision of the employer is an act of plan administration, even when the welfare plan expressly grants the employer the discretion to determine whether an illness has affected its employees for which benefits will be provided. If the employer decides not to treat the sickness as a covered illness because it is an epidemic that would be extremely costly to the employer, then the employer has breached its fiduciary duty to administer the welfare plan in the best interest of the employee participants. The level of benefits remains the same, despite all of the employees being denied medical benefits as a result of a determination by the employer that no one is ill; a determination that is in breach of employer's fiduciary duty to the plan participants.

It is only when the employer modifies or amends the form or structure of the plan itself, or creates or terminates the plan, that a plan design decision takes place. In the above example, a change in the level of benefits could occur if the

employer, knowing of a recent outbreak of cholera in another region of the United States, amends the medical welfare benefits plan to include a specific provision that cholera is not a covered illness. The amendment would be a settlor function that was not a fiduciary decision. Because the settlor function results in a change in the written plan documents, all of the employee participants will be able to immediately know that the employer is no longer covering illness caused by cholera bacteria. The employees can then make a decision as to whether to seek new employment or obtain some type of supplemental private health insurance.

Settlor acts or plan design decisions require the employer "to ***adopt, modify, or terminate***" the terms of the plan or to make "a decision ***regarding the form or structure of the plan*** such as who is entitled to receive plan benefits and in what amounts, or how such benefits are calculated." *Hughes*, 525 U.S., at 443-44 (emphasis added). The effect of the action has nothing to do with whether an employer's act is a settlor function or an exercise of a fiduciary duty. Decisions of an employer that do not change the form or structure of a plan through creation, modification, alteration, amendment or termination of the plan are not settlor functions, despite the benefits affected being both nonvested and unaccrued.

In any case of statutory construction, including under ERISA, the analysis begins with the plain language of the statute. *Hughes*, 525 U.S., at 438. Section 3(21)(A) of ERISA provides:

> [A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or

> disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any monies or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A).

The United States Court of Appeals for the Seventh Circuit in *Herdrich v. Pegram*, 154 F.3d 362, 370 (7th Cir. 1998), *cert. granted*, 120 S.Ct. 10 (Sept. 28, 1999), in a case recently orally argued in the Court, emphasized that Congress intended section 3(21)(A) of ERISA be broadly interpreted, stating:

> Congress, when it enacted ERISA, intended that this statutory definition of "fiduciary" be broadly interpreted. As stated by the Chairman of the House Committee on Education and Labor, 120 Cong. Rec. 3977, 3983 (February 25, 1974) *reprinted*, 2 Legislative History of the Employee Retirement Income Security Act of 1974 at 3293:
>
> > The Committee has adopted the view that the definition of fiduciary is of necessity broad . . . . A fiduciary need not be a person with direct access to the assets of the plan . . . . Conduct alone may in an appropriate circumstance impose fiduciary obligations. It is the clear intention of the Committee that any person with a

> specific duty imposed upon him by this statute be deemed to be a fiduciary . . . .

The Court in *Varity*, 516 U.S., at 502 (emphasis added) discussed the meaning of fiduciary within the context of administration or management of an ERISA plan, stating:

> To decide whether Varity's actions fall within the statutory definition of "fiduciary" acts, we must interpret the statutory terms which limit the scope of fiduciary activity to discretionary acts of plan "management" and "administration." ERISA § 3(21)(A). These words are not self-defining, and the activity at issue here neither falls clearly within nor outside of the common understanding of these words. The dissent looks to the dictionary for interpretive assistance. *See post*, at 15. Though dictionaries sometimes help in such matters, we believe it more important here to look to the common law, which, over the years, has given to terms such as "fiduciary" and trust "administration" a legal meaning to which, we normally presume, Congress meant to refer. *See, e.g., Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992). ***The ordinary trust law understanding of fiduciary "administration" of a trust is that to act as an administrator is to perform the duties imposed, or exercise the powers conferred, by the trust documents.*** *See* Restatement (Second) of Trusts § 164 (1957); 76 Am.Jur.2d, Trusts § 321 (1992). *Cf.* ERISA § 404(a). The law of trusts also understands a trust document to implicitly confer "such

> powers as are necessary or appropriate for the carrying out of the purposes" of the trust. 3 A. Scott & W. Fratcher, Law of Trusts § 186, p. 6 (4th ed.1988). *See also* Bogert & Bogert, Law of Trusts and Trustees § 551, at 41; *Central States*, 472 U.S., at 570.

Finally, the Court in *Varity*, 516 U.S., at 504 (emphasis in the original) explained the reason for applying the fiduciary standard to the exercise of discretionary powers:

> There is more to plan (or trust) administration than simply complying with the specific duties imposed by the plan documents or statutory scheme; it also includes the activities that are "ordinary and natural means" of achieving the "objective" of the plan. Bogert & Bogert, *supra*, § 551, at 41-52. Indeed, the primary function of the fiduciary duty is to constrain the exercise of *discretionary* powers which are controlled by no other specific duty imposed by the trust instrument or the legal regime. If the fiduciary duty applied to nothing more than activities already controlled by other specific legal duties, it would serve no purpose.

With these principles from *Spink*, *Varity*, and *Hughes* in mind, the pertinent provision of section 4.5(a) of the BEST Plan (a copy of the entire section 4.5 is in Appendix D) reads:

> [N]o Change in Control will be considered to have occurred if, before the time when a Change in Control would otherwise be considered to have occurred, the Board (as it exists before such event occurs) determines

that it will not treat the event as a Change in Control.

Section 4.5 of the BEST Plan was written to require that in the event of an acquisition of Barnett, the Barnett Board's decision on whether a change of control would occur had to be made in the context of an act of administration and management of the BEST Plan. If the board did nothing and Barnett was acquired, then a change of control took place under the BEST Plan.

The only way the Barnett Board could avoid an acquisition of Barnett being a change of control under the BEST Plan was for the board to exercise its discretion under section 4.5 as a fiduciary and make an affirmative determination that no change of control would take place. This was because the Barnett Board by itself did not have the authority to amend the BEST Plan. The affirmative and discretionary determination by the Barnett Board had to be an act of administration and management of the BEST Plan because it was an exercise of powers conferred under the section 4.5 of the BEST Plan. The BEST Plan's language assured that the change of control determination under section 4.5 would be a fiduciary one.

The Barnett Board's determination involved a discretionary decision solely in respect to the management and administration of the BEST Plan, as well as control respecting management and disposition of its assets. The Barnett Board did not amend, alter, modify or change any BEST Plan provision. Nor did the board change the terms, structure, or form of the BEST Plan. Nor did the board sit still and do nothing under the BEST Plan. Instead, the Barnett Board made an affirmative determination pursuant to and solely for purposes of section 4.5 of the BEST Plan not

to treat the shareholder approval of the merger of Barnett as a change of control.

Neither the terms, form, nor structure of the BEST Plan changed during the time Barnett was being acquired by NationsBank. Accordingly, there were no facts that would support any finding that the Barnett Board exercised a settlor function or made a plan design decision in determining under section 4.5 of the BEST Plan that no change of control of Barnett would take place.

The district court's order of dismissal demonstrates the compound effect of its erroneous holding that the discretionary determination of the Barnett Board under section 4.5 concerning a change of control was not fiduciary. The district court wrote that the mandatory requirements that Barnett pay the $53,000,000 acquisition loan and allocate the 3,300,000 shares of Barnett stock owned by the BEST Plan to Barnett's employees in the event of a change of control were "subject to the Board's *unrestricted* ability to determine, prior to its occurrence, that no Change in Control will occur. See *§ 4.5(a).*" *Burns v. Rice*, 39 F.Supp.2d, at 1358, App. B at 41 (emphasis added). ***The district court cited to section 4.5(a) of the BEST Plan itself as granting the Barnett Board the discretionary authority to make the no change in control decision!*** The no change of control discretionary determination was made by the Barnett Board while administering the BEST Plan because, as the district court had to acknowledge, that determination was an "exercise [of] the powers conferred by the trust document." *Varity*, 516 U.S., at 502.

The Eleventh Circuit's opinion in *Burns* ignored *Varity*, and then held that the fact that the Barnett Board made the no change in control determination "through an existing provision of the Plan rather than an amendment is

irrelevant; the effect of the action is what is key . . ." In so holding, the Eleventh Circuit failed to follow all of the holdings of the Court in *Spink* and *Hughes* with respect to the settlor-fiduciary distinction. Furthermore, the Eleventh Circuit ignored the plain language of the statutory definition of a fiduciary under ERISA and also this Court's interpretation of plan administration under *Varity*.

Within the past four years, this Court granted certiorari and reversed two decisions of the United States Court of Appeals for the Ninth Circuit in *Spink* and *Hughes*, when those decisions demonstrated a fundamental misunderstanding of the settlor-fiduciary distinction. In both cases, the grant of certiorari and subsequent reversal allowed the employer and plan sponsor to act in its best interest without regard to the interests of the plan participants. When the Eleventh Circuit has made a similar mistake in understanding the settlor-fiduciary distinction, especially in a case involving approximately a quarter of a billion dollars in pension benefits, this Court should equally grant certiorari and reverse to protect the interests of the employee participants.

In the absence of a consistent following of the Court's holdings in *Spink*, *Varity*, and *Hughes* by the United States Courts of Appeals, no employee participant can be certain that a discretionary determination made through the provisions of an ERISA benefit plan is an act of plan administration subject to the fiduciary duty to act in the employee participants' best interest.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-2094

D.C. Docket No. 98-00233-CIV-J-21-A

THOMAS S. BURNS, JR., on Behalf of himself and all others similarly situated and on behalf of the Barnett Employee Savings & Thrift Plan, Plaintiff-Appellant,

versus

CHARLES E. RICE, THOMPSON L. RANKIN, JACK B. CRITCHFIELD, RITA BORNSTEIN, REMEDIOS DIAZ OLIVER, et al., Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

BEFORE: EDMUNDSON and MARCUS, Circuit Judges and HANCOCK*, Senior District Judge.

PER CURIAM:

*Honorable James H. Hancock, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

Plaintiff Thomas S. Bums, Jr., appeals the district court's granting of the Defendants' Federal Rule of Civil Procedure 12(b)(6) motion to dismiss this action, in which Plaintiff has alleged a breach of fiduciary duties under the

Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq. Because this Court finds that the Defendants were not acting in a fiduciary capacity for purposes of ERISA but, rather, in a settlor capacity, the district court's order is due to be affirmed.

Plaintiff Burns was a member of an ESOP, called the BEST Plan, for employees of Barnett Banks, Inc. The BEST Plan was a qualified ERISA retirement plan at all times relevant to the present action. The Plan's documents included a provision that upon a change of control of Barnett Banks, approximately 3,300,000 shares of unallocated stock held in a suspense account would immediately vest and be allocated to the participants' individual accounts and Barnett Banks would repay the balance of an acquisition loan, held by Barnett Banks and used by the Plan to purchase the shares. However, the Plan also provided that no change of control would be deemed to have occurred for purposes of allocating the suspense shares and repaying the loan if the Board of Directors of Barnett Banks so voted prior to the change of control.

Barnett Banks merged with NationsBank on January 9, 1998 pursuant to a plan of merger, which was approved by the two banks' shareholders on December 19, 1997. On December 17, 1997, two days prior to the approval of the merger, the Board of Directors of Barnett Banks voted not to treat the proposed merger as a change of control for purposes of the BEST Plan. As a result of the Board's decision, the suspense shares were not allocated to the individual participants' accounts and the acquisition loan was not repaid. No previously vested benefits were affected, only the suspense shares.

On March 16, 1998, Burns filed a class action complaint and on May 6, 1998, Burns filed an amended class

action complaint.. The amended complaint alleged that the Defendants, who were members of the Board of Directors of Barnett Banks at the time of the December 17, 1997 vote, had breached their fiduciary duties under ERISA. Specifically, the complaint asserted that the Board violated 29 U.S.C. §§ 1104(a) by voting not to treat the merger with NationsBank as a change of control for purposes of the BEST Plan. Defendants moved to have the complaint dismissed under Federal Rule of Civil Procedure 12(b)(6). The motion to dismiss was granted with prejudice by the district court on December 10, 1998, and Burns then appealed..

We review a dismissal under Federal Rule of Civil Procedure 12(b)(6) de novo, applying the same standards as the district court. See Harper v. Blockbuster Entertainment Corp., 139 F.3d 1385 (11th Cir. 1998). The allegations in the complaint must be accepted as true and construed in the light most favorable to the plaintiff. See Kirby v. Siegelman, 195 F.3d 1285, 1289 (11th Cir. 1999). Only if the movant demonstrates beyond doubt that the plaintiff would not be entitled to relief under any set of provable facts will the motion to dismiss be granted. See Harper, 139 F.3d at 1385.

Although Burns has argued that the Defendants breached their fiduciary duties as ERISA plan administrators, he has failed to fully appreciate the fact the courts recognize a distinction between plan administration, which is fiduciary, and settlor-type functions, which are not fiduciary. See Lockheed Corp. v. Spink, 517 U.S. 882, 889-91 (1996) (extending the settlor-fiduciary distinction from ERISA welfare plans to ERISA pension plans). Settlor-type functions are those which are analogous to the actions of the settlor of a private trust, see id. at 890, and include "decision[s] regarding the form or structure of the Plan such as who is entitled to receive Plan benefits and in what amounts, or how such benefits are calculated." Hughes

Aircraft Co. v. Jacobson, 525 U.S. 432, 444 (1999). In Phillips v. Amoco Oil Co., 799 F.2d 1464, 1471 (11th Cir. 1986), we explained as follows:

> ERISA simply does not prohibit a company from eliminating previously offered benefits that are neither vested nor accrued. Moreover, the ERISA scheme envisions that employers will act in a dual capacity as both fiduciary to the plan and as employer. ERISA does not prohibit an employer from acting in accordance with its interests as employer when not administering the plan or investing its assets.

Other courts make the same distinction. See, e.g., Johnson v. Georgia-Pacific Corp., 19 F.3d 1184 (7th Cir. 1994); Dzinglinski v. Weirton Steel Corp., 875 F.2d 1075 (4th Cir. 1989).

In the present case, the Defendants were unquestionably acting as settlors in determining that the merger should not be deemed a change of control for purposes of the BEST Plan. They were not administering plan benefits or managing plan assets but were determining the level of benefits to be afforded plan participants, a settlor-type function, and therefore were privileged to act in the best interests of the company as employer and Plan sponsor rather than in the best interests of the Plan participants. The Board's vote simply eliminated purely contingent and wholly unaccrued and non-vested benefits. That the Board accomplished this through an existing provision of the Plan rather than an amendment is irrelevant; the effect of the action is what is key. Furthermore, we also reject Plaintiff's alternative argument that the Board's vote came too late, finding that no change of control, as contemplated by the

Plan, took place prior to the December 19, 1987 shareholders' vote. Defendants breached no duty owed the Plan participants under ERISA, and for the reasons set forth herein and in the well-reasoned order of the district court, the decision below is AFFIRMED.

FILED U.S. COURT OF APPEALS ELEVENTH CIRCUIT
FEB 17 2000
THOMAS K. KAHN CLERK

Appendix B

UNITED STATES DISTICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

THOMAS S. BURNS, JR., on Behalf of himself and all others similarly situated and on behalf of the Barnett Employee Savings & Thrift Plan,

Plaintiffs

V. Case No.: 98-233-CIV-J-21A

CHARLES E. RICE, THOMPSON L. RANKIN, JACK B. CRITCHFIELD, RITA BORNSTEIN, REMEDIOS DIAZ OLIVER, FREDERICK H. SCHULTZ, JAMES L. BROADHEAD, ALVIN R. CARPENTER, STEWART TURLEY, CLARENCE V.MCKEE, MARSHALL M. CRISER, and JOHN A. WILLIAMS,

Defendants.

ORDER

This cause comes before the Court on Defendant's Motion to Dismiss (Dkt. 31), Plaintiffs Opposition (Dkt. 34) thereto, and Defendants' authorized Reply (Dkt. 52) thereto.

I. Motion to Dismiss Standard

It is well established that "a motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would not be entitled to recover under any state of facts which could be proved in

support of his claim." Cook & Nichol, Inc. v. Plimsoll Club, 451 F.2d 505, 506 (5th Cir. 1971); accord Conley v. Gibson, 355 U.S. 41, 47-48 (1957). In evaluating the sufficiency of a complaint for purposes of a motion to dismiss, the factual allegations of the complaint must be accepted as true, Hishon v. King& Spalding, 467 U.S. 69(1984), and viewed in a light most favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232 (1974). Of course, the Court is not required to accept as true allegations which state conclusions of law. Solis-Ramirez v. United States, 758 F.2d 1426, 1429 (11th Cir. 1985).'[1]

II. Factual Background

Generally

In 1997, a deal was struck whereby Barnett Banks, Inc. ("Barnett") was merged into N.B. Holdings, a wholly-owned acquisition subsidiary of NationsBank Corporation ("NationsBank"). Plaintiff, a former Barnett employee and participant in Barnett's Employee Savings & Thrift Plan ("BEST Plan" or "Plan"), brings this putative class action pursuant to the Employee Retirement and Security Income Act ("ERISA"), 29 U.S.C.§ 1001-1461, challenging actions taken by the Defendants, the former members of the Board of Directors of Barnett, with respect to the BEST Plan, which actions prevented the operation of a provision of the Plan which would have granted additional benefits to all BEST Plan participants.

Barnett's Merger

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[1]Accord Grindstaff v. Green, 133 F.3d 416. 421 (6th Cir. 1998); Panaras v. Liquid Carbonic Ind. Corp.,74 F.3d 786, 792 (7th Cir. 1996); 5A Wright & Miller. Federal Practice & Procedure, § 1357 at 315-18 (1990).

On August 29, 1997, Barnett and NationsBank entered into a merger agreement. (Am. Compl. ¶ 9). On November 20, 1997, Barnett and NationsBank filed a joint proxy statement with the Securities and Exchange Commission pursuant to section 14(a) of the Securities and Exchange Act of 1934, which statement was required to contain information specified in Schedule 14A of Regulation 14A issued under that Act. (Am. Compl. ¶ 10). The proxy statement disclosed, inter alia, the expected elimination of numerous positions at Barnett and its subsidiaries (Am. Compl. ¶ 10) and the payment to various Barnett directors and senior executives of some $48 million under the Barnett Supplemental Executive Retirement Plan (Am. Compl. ¶ 11) but made no disclosure "relating to the effect of a change in control under the BEST Plan," (Am. Compl. ¶ 17).

By December 11, 1997, Barnett and NationsBank had obtained all necessary regulatory approvals for the merger, subject to a statutory thirty-day waiting period and shareholder approval. (Am. Compl. ¶ 12). On December 17, 1997, Defendants, the Board of Directors of Barnett, met and passed a resolution that, for purposes of Barnett's BEST Plan, no Change in Control would take place upon shareholder approval of the merger. (Am. Compl. ¶ 13). On December 19, 1997, the shareholders of Barnett and NationsBank met separately, and each approved the merger. (Am. Compl. ¶ 14). On January 9, 1998, the merger was completed. (Am. Compl. ¶15).

Defendant's BEST Plan

Barnett's BEST Plan is an employee retirement savings plan. Reference to the terms of the Plan[2] disclose that

[2] Although Plaintiff did not attach a copy of the BEST Plan to his

employees of Barnett who are eligible can elect to open individual BEST Plan accounts and contribute portions of their salary to that account. Barnett matches those contributions with cash or shares of Barnett stock.

Pursuant to provisions of the Plan authorizing such, the BEST Plan took out an Acquisition Loan[3] to purchase shares of Barnett stock, known as "Financed Shares," which were pledged as security for the Acquisition Loan. These Financed Shares, which were held in a separate account called the "Suspense Account" and were not allocated to the individual accounts of BEST Plan participants, could be used by Barnett to meet its matching obligation under the BEST Plan.[4] As alleged by Plaintiff, and stated in the BEST Plan

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Amended Complaint, Defendants have submitted a copy thereof as an exhibit to their Motion to Dismiss. Because the theories of Plaintiff's Amended Complaint rely on the terms of said Plan, and because Plaintiff is thus clearly on notice of the Plan and its terms, it is proper for the Court to receive this Plan and consider the legal implications of its terms without converting Defendants' motion into one for summary judgment under Rule *56*. See, e.g., In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. I 997)(a document integral to or explicitly relied upon in the complaint may be considered without converting the motion [to dismiss] into one for summary judgment); accord Shaw v. Digital Equip. Corp., 82 F.3d 1194, 1220 (1st Cir. 1996); Cotec Indus. v. Sum Holding I.P.. 949 F.2d 42, 48 (2d Cir. 1991). It should also be noted that Plaintiff has not objected to Defendants' submission or the Court's consideration of the Plan.

3 While the allegations of Plaintiff's Amended Complaint indicate that there were multiple Acquisition Loans, for purposes of simplicity the Court will refer to such simply as the Acquisition Loan.

[4] Specifically, as explained by Defendants, Barnett annually must contribute to the BEST Plan any amounts due on the Acquisition

itself, the Plan, and specifically its Acquisition Loan and Suspense Account components, served as a means of corporate finance. (Am Compl. ¶ 4; Introduction to Best Plan).

As of December 31, 1997, there were 3,337,584 shares of Barnett common stock in the Suspense Account, with a market value of over $200 million, (Am Compl. ¶ 2!), and over $53 million owing on the Acquisition Loan, (Am Compl. ¶ 23).

Section 4.5 of the BEST Plan contains a provision which automatically triggers certain events upon the occurrence of one of the several standard corporate takeover or merger scenarios defined therein. Specifically, § 4.5 provides that immediately upon a "Change in Control," as that term is defined in § 4.5(a)(1)-(5) thereof, Barnett is required to make a contribution to the Plan to pay the entire outstanding balance of the Acquisition Loan; all Financed Shares are then to be released from the Suspense Account; and the released Financed Shares are to be allocated to the accounts of participating employees according to a formula. The Changes in Control defined in § 4.5(a)(1)-(5) include such things as hostile takeovers, asset sales, and mergers.

Section 4.5(a), however, also contains a fail-safe that allows the Board of Directors of Barnett, under certain circumstances, to prevent this automatic triggering of section 4.5 and the resultant disbursement of the Financed Shares

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Loan, which contributions are used to make payments on that loan. Following such contributions, a corresponding portion of the Financed Shares are released from the Suspense Account, which released shares can be used to satisfy Barnett's matching obligation under the BEST Plan.

from the Suspense Accounts to the Best Plan participants' accounts. Specifically, § 4.5(a) provided, in pertinent part, as follows:

> [N]o Change in Control will be considered to have occurred if, before the time when a Change in Control would otherwise be considered to have occurred, the Board (as it exists before such event occurs) determines that it will not treat the event as a Change in Control.

As set forth above, prior to shareholder approval of the Barnett-NationsBank merger, the Board of Directors of Barnett met and passed a resolution that, for purposes of Barnett's BEST Plan, no Change in Control would take place upon shareholder approval of the merger. Such resolution in fact prevented the distribution of the Financed Shares from the Suspense Account to the individual accounts of the BEST Plan participants.

Plaintiff's Allegations[5]

Paraphrasing ERISA's statutory definition thereof, Plaintiff alleges that each of the Defendants was a fiduciary with respect to the BEST Plan because he or she exercised discretionary authority or control respecting administration and management of said Plan, including the specific determination pursuant to § 4.5 not to treat the merger as a Change in Control thereunder. (Am. Compl. ¶ 28). Also of

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[5] The Court would note, although perhaps of little moment, that many of the allegations of Plaintiff's Amended Complaint contain preemptive legal arguments, apparently directed at the very issues raised by Defendants' Motion to Dismiss.

note is Plaintiff's allegation that no later than November 20, 1997, the date of the filing of the proxy statement, the benefits provided by § 4.5 of the BEST Plan accrued to all eligible employees of Barnett and its subsidiaries. (Am Compl. ¶ 20).

Plaintiff alleges that by preventing the operation of § 4.5 (and thereby the distribution of the Financed Shares from the Suspense Account) the Defendants breached their fiduciary duties to the Plaintiff, as such was action in an arbitrary and capricious manner; constituted failure to discharge their duties under the BEST Plan; and constituted failure to act solely in the interests of the participants and beneficiaries of the BEST Plan (¶ 27).

Plaintiff thus seeks, on behalf of himself, all others similarly situated, and the BEST Plan, appropriate equitable relief under § 1132(a)(3) for Defendants' violation of § 1104(a) and remedial relief under § 1132(a)(2) for Defendants' violation of § 1109(a), as well as prejudgment interest, attorney's fees, and costs.

III. Applicable Law

For purposes of ERISA,

> a person is a fiduciary with respect to a plan to the extent
>
> (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets; or
>
> ***

> (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A).

Under ERISA, a fiduciary is required to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries," id. § 1104(a), or he is "personally liable to make good to [the] plan any losses" that result from "breaches [of] any of the responsibilities, obligations, duties imposed" by the Act, id. civil action for appropriate relief under § 1109, id. § 1132(a)(2); to enjoin acts violative of ERISA or the terms of the plan, id. § 1132(a)(3)(A); or to obtain other equitable relief to redress such violations or enforce other provisions of ERISA or the terms of the plan, id. § 1132(a)(3)(B)(i)-(ii).

As the above shows, the keystone of an action under ERISA is the particular defendant's status as an ERISA fiduciary under § 1002(21)(A).[6] Defendants' instant motion raises this legal issue, and Plaintiff's conclusory allegations that Defendants were fiduciaries under ERISA, see, e.g., Am. Compl. at ¶ 27, are insufficient to preclude examination of this legal issue, see Solis-Ramirez, 758 F.2d at 1429 (holding that in considering motion to dismiss district court not required to accept as true allegations of complaint that state conclusions of law).

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[6] See Lockheed Corp. v. Spink, 517 U.S. 882, 889 (1996)(holding that Court of Appeals therein erred by not first resolving issue of defendant's fiduciary status before determining whether there had been a violation of § 1106, another provision of ERISA which regulates the conduct of plan fiduciaries).

IV. Discussion

It is well established that an employer can also serve as a fiduciary, and in that capacity can administer and manage its own ERISA plan and the plan's assets. See 29 U.S.C. § 1108(c)(expressly stating that no part of ERISA prohibits an employer from also being a fiduciary); see also Gelles v. Skrotsky, 983 F. Supp. 1398, (M.D. Fla. 1997)(citing § 1108(c); noting other courts which have recognized same). When acting in this dual capacity, employers are bound by ERISA's fiduciary obligations only to the extent that they are performing duties within the scope of § I 102(21)(A)'s definition of the term "fiduciary." See, e.g., Johnson v. Georgia-Pacific Corp., 19 F.3d 1184, 1188 (7th Cir. 1994)(citing John Hancock Mut. Life Ins, Co. v. Harris Trust & Savings Bank, 510 U.S. 86 (1993)).

Two related principles arise from this basic rule: first, an employer owes no fiduciary duty under ERISA when it makes decisions regarding benefits that have not yet vested or accrued to participants in the particular plan; second, an employer owes no fiduciary duty under ERISA when it makes what are known as "plan design decisions," which include decisions regarding the level(s) of benefits to be afforded to plan participants. The Court concludes that each of these principles, discussed below, precludes, as a matter of law, the claims set forth in Plaintiff's Amended Complaint.

1. Employer Decisions Affecting Unaccrued, Non-Vested Benefits

As to the first principle, "ERISA simply does not prohibit a company from eliminating previously offered benefits that are neither vested nor accrued," allowing an employer to make such decisions without being subject to liability for breach of fiduciary duty under ERISA. Phillips v.

Amoco, 799 F.2d 1464, 1471 (11th Cir. 1986); Owens v. Storehouse. Inc., 984 F.2d 394, 397 (11th Cir. 1993)(citing Phillips); see also Sutton v. Weirton Steel, 724 F.2d 406, 410 (4th Cir. 1983)(holding that employer did not violate ERISA when it modified contingent, unfunded,[7] i.e., unaccrued, benefits); see also generally Bennett v. Conrail Matched Savings Plan, 1997 WL 700538 at (E.D. Pa. Oct. 30, 1997)(holding that employer did not act as an ERISA fiduciary when it decided to include in its plan employees of its merger partner, though such would dilute original plan participants' interest in shares set aside in plan's suspense account, as such shares were unaccrued benefits as to which original plan participants had no vested rights); Rummel v. Consolidated Freightways, Inc., 1992 WL 486913 at (N.D. Cal. Sep. 17, 1992)(holding that employer did not act as an ERISA fiduciary when it allocated employees, as such benefits were not vested).[8]

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[7] Plaintiff argues that Sutton can be distinguished because it involved unfunded benefits, unlike the instant case. See Dkt. 34 at 15-16. However, neither the allegations of' Plaintiffs Amended Complaint nor the terms of the BEST Plan support such an assertion. See Am. Compl. at ¶ 19(recognizing that employer contribution to payoff Acquisition Loan necessary prior to distribution of Financed Shares to Plan participants; BEST Plan § 4.5(b)(same). Additionally, and arguably more importantly, Plaintiff has cited no persuasive authority for the proposition that ERISA's fiduciary obligation applies to actions affecting unaccrued, unvested benefits that are funded.

[8] Both Bennett and Rummel, which discuss both defined benefit and defined contribution plans, would seem to debunk Plaintiffs argument that for purposes of determining the fiduciary status of Defendants herein, some distinction should be made between these two types of plans. In any event, the Court's overall conclusion herein does not stand or fall on whether the BEST Plan is characterized as one or the other type of such plans.

It is clear that the Financed Shares in the Suspense Account in the instant case were contingent, see BEST Plan § 4.5(a)(requiring allocation of all shares in Suspense Account to accounts of all Plan participants only upon a Change in Control, as defined therein), and thus that these benefits were neither accrued, see 29 U.S.C. § 1002(23)(13) (defining term "accrued benefit" as "in the case of a plan which is an individual account plan, the balance of the individual's account."),[9] nor vested, see BEST Plan §4.5(b)(4)(stating that

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[9]As noted above, Plaintiff's Amended Complaint alleges that no later than November 20. 1997, the date of the filing of the proxy statement, the benefits provided by § 4.5 of the BEST Plan accrued to all eligible employees of Barnett and its subsidiaries." (Am Compl. ¶ 20). Such, however, is a legal conclusion which the Court is not obliged to accept as true for purposes of considering Defendant's instant motion. See Solis-Ramirez, 758 F.2d at 1429. Under § 1002(23)(B)'s definition, for purposes of a defined benefit plan, an accrued benefit is the balance of the individual's account. It is undisputed, and in fact the essence of Plaintiff's claims, that the Financed Shares in the Suspense Account were never allocated to the individual accounts of Plaintiff or any other BEST Plan participants. Further, it is clear that § 4.5(a) only required allocation of the Financed Shares from the Suspense Account to the Plan participants' individual accounts upon a Change in Control as defined therein; that § 4.5's definition of Change in Control, though it incorporates concepts of the regulations promulgated pursuant to the federal securities laws, does so "as modified by th[at] Section"; that under §4.5(a)(4) & (5), a Change in Control does not occur until shareholder approval of a merger, consolidation, or sale; and that, as alleged in ¶ 14 of the Amended Complaint, shareholder approval of the merger occurred on December 19. 1997, two days after the Defendants had already determined that no Change in Control would take place for purposes of § 4.5 of the BEST Plan. Thus, it is clear that as a matter of law the Financed Shares in the Suspense Account on December 17, 1997, were not accrued benefits of any BEST Plan participant, including Plaintiff.

all account balances of all participants would be fully vested as of the date of a Change in Control), at the time the Defendants prevented the triggering of § 4.5 of the Plan. Thus it is clear that the above stated principle applies, precluding Plaintiff's claims herein.

2. "Plan Design" Decisions

As to the second principle, it is well-established that an employer's decisions regarding whether, how much, and to whom to provide benefits, known generally as "plan design" decisions, do not fall within the scope of the defined functions of an ERISA fiduciary, and thus that an employer can make such decisions without being subject to liability for breach of fiduciary duty under ERISA. See Lockheed Corp. v. Spink, 517 U.S. 882, 890 (1996); Siskind v. Sperry Retirement Program, 47 F.3d 498, 505 (2d Cir. 1995); Johnson v. Georgia-Pacific Corp., 19 F.3d 1184, 1188 (7th Cir. 1994). Thus, under ERISA, employers enjoy wide latitude to adopt, modify, or terminate employee benefit plans. Lockheed Corp., 517 U.S. at 891 (citing Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, (1995)).

3. Plaintiff's Various Arguments

Although the Court finds the above principles sufficient to dispose of Plaintiff's claims entirely, some of Plaintiff's arguments that have not been dealt with merit discussion for the sake of completeness and, hopefully, clarity. These are discussed below.

First, citing to Useden v. Acker, 947 F.2d 1563, 1574 (11th Cir. 1991), Plaintiff asserts that "ERISA contemplates that fiduciary responsibility will be reposed automatically in a party that assumes a discretionary role." Thus Plaintiff argues that, since Defendants exercised discretion regarding

the management and control of the Plan, as well as the disposition of its assets when they decided to prevent the operation of § 4.5, they are fiduciaries for purposes of ERISA.[10] The Court agrees with Defendants that Useden does not extend so far. The quoted portion of the opinion comes from a general discussion of the farthest possible reach of ERISA's definition of the term fiduciary that can be contemplated, including "theoretical contrivances," irrespective of other considerations, id. at 1574; such statement does not discuss the clear authority, discussed above, which holds that decisions which affect unaccrued, unvested rights or other decisions of plan design do not give rise to fiduciary liability under ERISA.

Plaintiff also cites Varity Corp. v. Howe, 516 U.S. 489, 502 (1996), wherein the Supreme Court, in construing the plan administration aspects of § 1102(21)(A)'s definition of the term fiduciary, noted that the ordinary trust law understanding of fiduciary administration of a trust includes performance or duties imposed by, or exercise of powers conferred by, the trust documents. Thus, Plaintiff argues that since Defendants exercised a power conferred by §4.5 in precluding the operation of that section, they are fiduciaries for purposes of ERISA.[11] Again, the Court agrees with Defendants that the mere fact that an ERISA plan expressly authorizes a particular action which is otherwise permissible under ERISA free from its fiduciary obligations, does not

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[10] This argument basically accepts Defendants' theory that it was entirely within their discretion to preclude the operation of § 4.5. As discussed below, Plaintiff has also argued that §4.5 mandated Defendants to allow § 4.5 to trigger (causing the Financed Shares to be allocated to Plan participants). i.e., that Defendants had no discretion regarding § 4.5.

[11] This argument necessarily also assumes that Defendants had discretion to preclude the operation of § 4.5.

ipso facto make that action subject to ERISA's fiduciary obligations. Such a conclusion would mean that a plan whose terms expressly recognized caselaw arising under ERISA would actually limit an employer's permissible actions more than a plan that did not recognize such caselaw. Such would be an untenable result. Cf. Sperry, 47 F.3d at 505-507 (holding that absence of language in single-employer's plan reserving employer's right to amend plan did not transform amendment into a fiduciary act.) Further, Plaintiff's reading of Varity ignores the fact that the case arose in a context where it was not clear whether the employer's challenged action (giving of detailed erroneous plan information and advice) was fiduciary in nature, as opposed to the instant case where clear precedent establishes that the elimination of benefits and decisions of plan design are not fiduciary in nature.

Second, Plaintiff argues that § 4.5 of the BEST Plan requires the Defendants to contribute funds sufficient to pay off the Acquisition Loan (and thereafter distribute the Financed Shares from the Suspense Account to the individual accounts of all Plan participants), making the instant case distinguishable from the authority cited by Defendants, which Plaintiff asserts involved only discretionary employer contributions to plans. In support of this argument, Plaintiff relies on the Plan language. See BEST Plan § 4.5(b)(1)("The Employers will immediately make a Contribution. . . to pay the Outstanding balances on the Acquisition Loans, and the Trustee will immediately pay such balances."). Such a position plainly omits to consider other material provisions of § 4.5. The portion of § 4.5(b)(l) relied upon by Plaintiff contains those provisions in effect upon a Change in Control, as defined therein; such provisions are, of course, subject to the Board's unrestricted ability to determine, prior to its occurrence, that no Change in Control will occur. See § 4.5(a). In other words, the provisions of§ 4.5(b)(1) become

mandatory only in the event that the Board omits to act otherwise, as did not happen here. The authority cited by Defendants in opposition to this argument also supports the Court's conclusion. See Adams v. LTV Steel Mining Co., 936 F.2d 368, 369-70 (8th Cir. 1991)(involving plan that allowed early retirement if, inter alia, employee and employer agreed it would be in each other's best interests; holding that employer's decision to deny early retirement based on its conclusion that such would be against its own interest was not a breach of fiduciary duty under ERISA).

Third, Plaintiff argues that because the Defendant's determination not to treat the merger as a Change in Control for purposes of the BEST Plan had the effect of precluding the automatic distribution of the Suspense Account shares, such determination exercised control regarding disposition of Plan assets and was also an act of administration or management under § 4.5 of the Plan. However, as noted above, caselaw makes clear that only action within the terms of § 1002(2 1)(A) is subject to fiduciary review under ERISA. See, e.g., Johnson, 19 F.3d at 1188. As also noted above, caselaw makes clear that decisions affecting unaccrued, unvested benefits and other plan design decisions are not subject to ERISA's fiduciary standards. See, e.g., Phillips, 799 F.2d at 1471 (re the former); Lockheed Corp., 517 U.S. at 890 (re the latter). Thus, because it is clear that Defendant's challenged actions were ones which affected unaccrued, unvested benefits and also were in the nature of plan design decisions, it is clear that these actions are not subject to ERISA's fiduciary standards.

V. Leave to Amend

Having thus dismissed all of the Amended Complaint, the only remaining issue is whether to allow Plaintiff leave to amend--that is, whether the dismissal should be with or

without prejudice. Circuit precedent requires that "[w]here a more carefully drafted complaint might state a claim, a plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice." Bank v. Pitt, 928 F.2d 1108, 1112 (11th Cir. 1991). The Eleventh Circuit has stated only two exceptions to this rule: (i) where the plaintiff has indicated that he does not wish to amend his complaint, and (ii) where a more carefully drafted complaint could not state a claim under the Conley standard. Id.

In this case, Plaintiff has not stated that he does not wish leave to amend. Thus the Court would normally presume that Plaintiff would seek such leave. However, as to the second exception stated in Pitt, the Court concludes that Plaintiff would not be able to amend his Complaint so as to state any claim against Defendants for breach of fiduciary duty arising out of the Barnett-NationsBank merger, because it is clear as a matter of law that Plaintiff cannot overcome the threshold issue of Defendants' fiduciary status. See Lockheed Corp., 517 U.S. at 889 (holding that Court of Appeals therein erred by not first resolving issue of defendant's fiduciary status before determining whether there had been a violation of substantive provision of ERISA governing conduct of plan fiduciaries). The dismissal of the Amended Complaint, therefore, will be with prejudice.

VI. Conclusion

Plaintiff has devoted much of his pleadings and his opposition to the instant motion to presenting to the Court various allegations and representations about the injustice that has allegedly been perpetrated upon himself and the other BEST Plan participants. Regardless of what one might think of Defendants' alleged actions, it is clear that ERISA imposes no obligations or restrictions upon such conduct. In

this regard, the words of the Seventh Circuit are particularly apt:

> [B]ecause ERISA is a highly technical statute [the Court's] part is to apply it as precisely as [possible], rather than to make adjustments according to a sense of equities in a particular case.

Johnson, 19 F.3d at 1190

Upon consideration of the foregoing, it is hereby **ORDERED**:

1. Defendant's Motion To Dismiss (Dkt. 31) is **GRANTED**, and Amended Complaint is **DISMISSED** with prejudice.

2. The Clerk is **DIRECTED** to enter judgment in favor of Defendants Plaintiff.

3. All other pending motions not expressly ruled upon herein are **DENIED as moot**.

DONE AND ORDERED at Jacksonville, Florida this 10th day of December, 1998.

/s/
RALPH W. NIMMONS, JR.
United States District Judge

FILED 98 DEC 10, CLERK, UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA JACKSONVILLE FLORIDA

Copies to: Counsel of Record

Appendix C

UNITED STATES DISTICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

THOMAS S. BURNS, JR., etc,

Plaintiff JUDGMENT IN A CIVIL CASE

v.

CHARLES E. RICE et al., Case Number: 98-233-CIV-J-21A

Defendant.

X **Decision by Court.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Court's order entered on December 10, 1998, judgment is entered in favor of the Defendants and against Plaintiff.

Richard D. Sletten
Clerk

Date: December 11, 1998

/s/ Evelyn Stout
(By) Deputy Clerk

FILED 98 DEC 11, CLERK, UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA JACKSONVILLE FLORIDA

Copies to:
Counsel of Record

Appendix D

Section 4.5 of the BEST Plan

4.5 **Change in Control**. In the event a Change in Control occurs, as defined in Subsection (a), while this provision remains in effect, no termination of or amendment to this Section will be made until all shares held in the Suspense Account have been allocated to Participants' Accounts, unless a majority of Participants in active Employment on the day before the Change in Control, and a majority in active Employment on the amendment date, consent in writing.

(a) **Definition of Change in Control**. A Change in Control includes any change required to be reported in Item 6(e) of Schedule 14A of Regulation 14A issued under the Securities Exchange Act of 1934 (the Exchange Act) as in effect from time to time and as modified by this Section. A Change in Control will be considered to have occurred under any of the circumstances described below. However, no Change in Control will be considered to have occurred if, before the time when a Change in Control would otherwise be considered to have occurred, the Board (as it exists before such event occurs) determines that it will not treat the event as a Change in Control. Alternatively, the Board will have the right to determine that a Change in Control has occurred with respect to one or more Participants but not with respect to all Participants.

(1) Any person (within the meaning of Exchange Act Sections 13(d)(2) and 14(d)(2)) becomes the beneficial owner (within the meaning of Exchange Act Rule 13d-3), directly or indirectly, of securities representing 24 percent or more of the combined voting power for election of directors of the then outstanding securities of the Company or any

successor.

(2) During any period of two consecutive years or less, individuals who at the beginning of such period constituted the Board cease, for any reason, to constitute a majority of the Board, unless the election or nomination for election of each new director was approved by a vote of at least two-thirds of the directors then still in office who were directors at the beginning of the period.

(3) The Board or any committee designated by the Board determines in its sole discretion that any person (within the meaning of Exchange Act Sections 13(d) and 14(d)(2)) has gained a direct or indirect controlling influence over the management of the Company.

(4) The Company's shareholders approve any merger or consolidation as a result of which its stock is or will be changed, converted or exchanged (other than a merger with a wholly-owned subsidiary), or any liquidation of the Company, or any sale or other disposition of substantially all the assets or earning power of the Company.

(5) The Company's shareholders approve any merger, consolidation or sale of assets to which the Company is a party, and as a result of which the persons who were shareholders immediately before the effective date of the merger, consolidation or sale of assets have or will have beneficial ownership of less than 80 percent of the combined voting power for election of directors of the surviving corporation following the effective date of the merger or consolidation.

(b) **Provisions in Effect Upon Change in Control.**

(1) **Contribution**. The Employers will immediately make a Contribution to the ESOP in an amount sufficient to permit the Trustee to pay the outstanding balances on all Acquisition Loans, and the Trustee will immediately pay such balances.

(2) **Allocation**. The Committee will characterize as an ESOP Discretionary Contribution the shares released from the Suspense Account when the Acquisition Loan is prepaid, and will cause the shares to be allocated among Eligible Employees as provided in Subsection 1 .22(a)(4).

(3) **Code Section 415 Limitations**. In the event the allocation resulting from the Change in Control causes any Participant to exceed the Section 415 Limitations described in Section 7.3 for the Plan Year, the shares which exceed the Maximum Annual Addition will be reallocated among other Participants. In the event reallocation of all the shares would cause all Participants to exceed their Maximum Annual Addition for mat Plan Year, the Committee will place the excess in a Section 415 suspense account and will allocate it in the next Plan Year. The Plan may not be terminated or merged until all shares are reallocated to Participants' Accounts.

(4) **Vesting**. All Account balances of all Participants will be fully vested as of the date when a Change in Control occurs.